

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

BECKLEY DIVISION

JAMES SURRETT and
ROSE SURRETT,
Plaintiffs,

v.

CIVIL ACTION NO. 5:15-cv-15444
(Consolidated with Civil Actions Nos. 5:15-cv-15525,
5:15-cv-15526, 5:15-cv-15527, 5:15-cv-15528, 5:15-cv-
15529, 5:15-cv-15530, 5:15-cv-15532, 5:15-cv-15533, &
5:15-cv-15534)

PINNACLE MINING
COMPANY, LLC,
Defendant.

MEMORANDUM OPINION AND ORDER

This Court previously entered an *Order* (Document 312) appointing United States Magistrate Judge Omar J. Aboulhosen as Special Commissioner to aid in the execution of judgment in this matter. The Court enters this Memorandum Opinion and Order to clearly set forth the authority for Magistrate Judge Aboulhosen to conduct proceedings as a Special Commissioner in this matter.

The Plaintiffs brought this lawsuit against the Defendant for damages to their property. The parties negotiated a settlement of this action following mediation held on May 17, 2017. (See Document 263.) Pursuant to the settlement agreement, judgment was entered in favor of the Plaintiffs on September 21, 2017 (Document 287). Following default upon payments made toward the settlement, the plaintiffs then applied for a writ of execution as to the defendant. The Clerk issued a writ of execution on August 10, 2018 (Document 305), which was served by the U.S. Marshal on August 14, 2018. Because the Plaintiffs have been unable to obtain satisfaction of their judgment, however, they now seek the appointment of a commissioner to conduct a proceeding in aid of execution pursuant to state and federal law.

Federal Rule of Civil Procedure 69(a) provides the general guidelines by which a money judgment is to be executed. Namely, the “procedure on execution — and in proceedings supplementary to and in aid of judgment or execution — must accord with the procedure of the state where the court is located, but a federal statute governs to the extent it applies.” Fed. R. Civ. P. 69(a)(1). Moreover, the judgment creditor “may obtain discovery from any person — including the judgment debtor — as provided in these rules or by the procedure of the state where the court is located.” Fed. R. Civ. P. 69(a)(2).

Because there is no specific federal statute on point, West Virginia law applies. Under West Virginia law, a judgment creditor may institute interrogatory proceedings before a “commissioner in chancery” (simply a “commissioner” following the consolidation of law and equity) to enforce an existing judgment. *See* W. Va. Code § 38-5-1; *see also State ex rel. TermNet Merchant Servs., Inc. v. Jordan*, 619 S.E.2d 209, 214 (W. Va. 2005). The “required duties, responsibilities and authority of a commissioner acting in interrogatory proceedings are further developed in subsequent portions of Article 5.” *TermNet*, 619 S.E. 2d at 214.


Although there is no “commissioner” in the federal judicial system, federal courts have ruled that a magistrate judge may serve in that role for purposes of conducting proceedings in aid of execution under West Virginia Code § 38-5-1. *See, e.g., Chicago Pneumatic Tool Co. v. Stonestreet*, 107 F.R.D. 674, 675 (S.D. W. Va. 1985); *Byron Originals, Inc. v. Iron Bay Model Co.*, No. 5:05-cv-82, 2006 WL 1004827, at *1 (N.D. W. Va. Apr. 12, 2006). As Chief Judge Haden observed in *Chicago Pneumatic Tool*, interrogatory proceedings essentially allow a commissioner “to join in the questioning during the deposition” of a judgment debtor, and the power to take depositions is specifically conferred on magistrate judges by 28 U.S.C. § 636(a)(3). Moreover, the Federal

Magistrate Act specifically provides that magistrate judges “may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.” 28 U.S.C. § 636(b)(3).

Accordingly, the Court hereby **APPOINTS** Magistrate Judge Omar J. Aboulhosn as a “commissioner” for purposes of conducting a proceeding pursuant to West Virginia Code § 38-5-1. Upon the Plaintiff’s ascertaining of a date and time that will be convenient to Magistrate Judge Aboulhosn, the Clerk is **DIRECTED** to issue summonses, pursuant to Rule 4 of the Federal Rules of Civil Procedure, directing the Defendant and/or its agents to appear at the specified date and time before Magistrate Judge Aboulhosn. In conducting the proceeding in aid of execution, Magistrate Judge Aboulhosn may enter any additional order pursuant to the Federal Rules of Civil Procedure or Chapter 38, Article 5 of the West Virginia Code.

The Court **DIRECTS** the Clerk to send a certified copy of this Order to counsel of record and to any unrepresented party.

ENTER: October 3, 2018


IRENE C. BERGER
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF WEST VIRGINIA